1978

Marjorie Winters v. Charles Anthony, Inc., Utah Corporation : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

MARJORIE WINTERS, :

Plaintiff-Respondent, :

v. : Case No. 15523

CHARLES ANTHONY, INC., a Utah Corporation, :

Defendant-Appellant. :

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE MARCELLUS K. SNOW, JUDGE

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action to recover the value of jewelry bailed to the Defendant-Appellant for the purpose of reworking the jewelry into a different piece. The reconstructed piece was subsequently either lost or stolen and remains undelivered to the Plaintiff-Respondent.

DISPOSITION IN LOWER COURT

The matter was tried on the 29th day of September, 1977, before the Honorable Marcellus K. Snow, sitting without a jury. On the 19th day of October, 1977, judgment was awarded in favor of Respondent in the amount of eight thousand one hundred and eighty dollars ($8,180.00), together with all court costs and interest at the rate of eight percent (8%) from May 25, 1976.

RELIEF SOUGHT ON APPEAL

Appellant seeks a remittitur of the damages assessed by

the trial court.

STATEMENT OF FACTS

On the 23rd of March, 1976, Respondent took a gold bracelet set with sixty-three green stones and fifty-four half pearls to Appellant's place of business at Trolley Square in order to have it converted into a cross to be worn as a pendant or pin. The bracelet was a gift received by Respondent around July of 1970 from Respondent's brother-in-law. The alterations were completed by Appellant around April 15, 1976.

On the 12th of May, 1976, Respondent tendered one hundred dollars ($100.00) as a partial payment for the work done; the total cost of the remanufacture was one hundred twenty-six dollars ($126.00). Subsequently, Appellant delivered the pendant cross to a Mr. H. J. VanderVeer for appraisal. VanderVeer had seen the item prior to its reconstruction. VanderVeer determined that the green stones were emeralds; he then assigned a value to them, the half pearls, and the piece in toto.

On the 14th day of June, 1976, Respondent returned to Appellant's place of business to pick up the completed item. She was informed by an employee of Appellant that the pendant was missing; the pendant has never been relocated. Whereupon, Respondent commenced an action for the value of said pendant in Third District Court.

Respondent brought a motion for Summary Judgment which

was denied by the court and the matter proceeded to trial. Conflicting testimony concerning the value of the lost pendant was given by Barry Nash, an employee of Appellant, and H. J. VanderVeer. The trial court adopted as the measure of damages the appraisal value of the pendant as determined by H. J. VanderVeer, stating in its Findings of Fact and Conclusions of Law #3:

> That the market value, the replacement cost to the Plaintiff, and appraisal value of the cross were the same.

The only matter that now concerns the Court is the appropriate valuation of the damages suffered by the Respondent.

ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING THE APPRAISAL VALUE AS THE MEASURE OF DAMAGES.

In its Findings of Fact and Conclusions of Law, the trial court determined that the appraisal value was the figure of recovery for the Respondent, concluding that the market value and replacement costs of the pendant were equal to that of the appraised value. In arriving at this determination, the court committed error in that it failed to utilize the appropriate measure of damages.

The appropriate measure of damages is market value, which is the same as replacement cost.

8 Am. Jur. 2d, Bailments §332 states that where bailed goods are lost or destroyed, the measure of damages is the value of the property at time and place of loss. §333 of the

same work states: "The value of the property for purposes of ascertainment of the damages is ordinarily determined by reference to its fair market value..." As a matter of law, market value is to be determined by sales in the ordinary course of business. Herein, sales in the ordinary course of business reflect the Salt Lake City retail jewelry trade.

In Clack-Nomah Flying Club v. Sterling Aircraft, Inc., 17 Ut. 2d 245, 408 P2d 904 (1965), a case involving the destruction of an airplane by a windstorm while in the custody of a bailee, this Court stated:

> This Court has consistently held that a bailee for hire is responsible for the value of goods entrusted to him which he fails to return... 408 P2d 904 (1965)

The Court went on to hold the bailee liable for the value of the unreturned aircraft. The Clack-Nomah decision did not discuss how it arrived at the value of the aircraft. However, the means by which value for personal property that is lost or destroyed is determined was settled by Park v. Moorman Mfg. Co., 121 Utah 339, 241 P2d 914 (1952). The Park case involved a breach of warranty, the warranty arising when defendant's agents promised that a certain chicken feed would be of great benefit to plaintiff's egg-laying chickens when, in fact, it ultimately killed them. The Court upheld an instruction to the jury which read:

> ...plaintiff is entitled to compensation for an amount that will correspond to the market value of the chickens which died...
> 241 P2d 914, 921 (1952)

The Court has thus upheld language consistent with the general measure of damages as referred to in 8 AM JUR 2d Bailments, supra.

The Park decision contains language which serves as a guide in all damage claims:

> The fundamental principle of damages is to restore the injured to the position he would have been in had it not been for the wrong of the other party.
> 241 P2d 914, 920 (1952)

In determining the method by which a party could be restored to his pre-injury condition, the Court determined:

> ...that where property is destroyed, the true measure of damages is the difference between the market value of that property immediately before the destruction and its replacement value.
> 241 P2d 914, 921 (1952)

Application of the replacement cost as the market value, as Park suggested, found realization in U. S. v. Hatahley, 257 F2d 920 (10th Cir. 1958); therein several Navajo Indians sued the United States under the Federal Tort Claims Act (28 USCA 1346(b) and 2671 et. seq.) for damages when a number of horses and burros were seized and destroyed in Utah by the United States Bureau of Land Management. The trial court set damages at $100,000.00; the case eventually reached the United States Supreme

Court (Hatahley v. U.S. 351 U.S. 173 (1956)) where a remand was ordered to the District Court on the damages issue. The case again reached the Tenth Circuit. There Park v. Moorman Mfg. Co., Supra. was quoted (re the fundamental principle of damages) and the Court of Appeals held:

> ...applying this rule, the plaintiffs were entitled to the market cost, or replacement cost of their horses and burros as of the time of taking...
> 257 F2d 920, 923 (emphasis added)

Hertz Lease Plan, Inc. v. Urban Transportation and Planning Assoc., Inc., 342 So2d 886 (La. App. 1977), was a recent case which also opted for damages based upon replacement costs. In that case, the defendant leased two office calculators from the plaintiff. The plaintiff sued for default upon the lease. The Louisiana appellate court held, inter alia, that the lessor was entitled to recover the replacement value of one calculator lost by the lessee. A court should, in arriving at a fair market value, consider the availability and price of like items; this the trial court failed to do herein.

In restoring Respondent to the position she would have been in had it not been for Appellant's wrong, the correct measure is the market value of the lost pendant cross.

Utah law, as held by this Court in Park v. Moorman Mfg. Co., Supra, finds replacement value to be determinative factor for lost or destroyed personality.

Mr. Nash on page 36 of the trial transcript (T. 36)

testified that, "I feel we could compose a piece (identical to the lost pendant) for somewhere between 3- and $4,000." Mr. Nash further testified that a similar item in Salt Lake City would retail at around five thousand dollars ($5,000.00) (T. 38). This figure represents the true market value in the Salt Lake City retail market, the market that is determinative as to recovery. This figure is considerably less than the $8,180.00 amount of damages assigned by the trial court through application of an inappropriate standard; it is $3,180 to $4,180 less.

POINT II

THE TRIAL COURT ERRED IN DETERMINING THAT THE APPRAISAL VALUE WAS EQUAL TO MARKET VALUE BECAUSE IN THE SALT LAKE CITY RETAIL MARKET, THE PENDANT COULD NOT HAVE COMMANDED THE APPRAISAL VALUE.

As noted above, the replacement cost of the pendant, upon which suit is brought, would be significantly less than the appraised value. This also reflects the difference between the true market value of the pendant and the appraised value. In Utah,

> As a general rule, market value is the highest price a purchaser is willing to pay for property, not being under compulsion to buy, and the lowest price a seller is willing to accept, not being under compulsion to sell. Northern Oil Co. v. Industrial Commission, 104 Utah 353, 140 P2d 329 (1943)

In the Salt Lake City retail jewelry market, the market which is determinative in this case, Mr. Nash testified, "I would expect realistically, the high retail figure (of the pendant) would not be more than five." ($5,000.00 - emphasis

added). Utilizing that figure ($5,000) in the market value determination as set out in Northern Oil Co. v. Industrial Commission, Supra., it appears that the trial court granted an award that was excessive by at least $3,180.

Recovery must be limited to the Salt Lake City retail jewelry market. In Watts v. Nevada Central R. Co., 23 Nev. 154, 44P. 423 (1894), a plaintiff was damaged by the destruction of hay he had stored with a railroad when a severe winter struck and his stock died without the hay. The court did not permit recovery on the basis of inflated winter prices, "...but its fair cash market value if sold in the market under ordinary circumstances..." 44 P. 423 (1894) (emphasis added) Herein, as Mr. Nash testified, under ordinary circumstances a pendant like the one lost could not command a price in the Salt Lake City retail jewelry market of more than $5,000.00

Mr. Nash's estimate concerning the retail cost of the pendant reflects his familiarity with the piece of jewelry and his six years of experience in retail jewelry; he is cognizant of a critical factor which H. J. VanderVeer, the appraiser, was not: that a piece of jewelry having value over a few thousand dollars is not subject to "keystoning." Keystoning was explained by Mr. VanderVeer at the trial as a doubling of the wholesale price by the jeweler to arrive at a retail figure (T 13-14). Mr. Nash

testified that "...When you have an item (that) costs more than a couple of thousand dollars, retail, a jeweler will not keystone - he will not double his price to arrive at (a) retail figure." (T29-30).

Mr. VanderVeer explained that he doubled the wholesale value of the emeralds and pearls to arrive at what he believed to be the retail value (T 12).

The evidence indicates the Salt Lake City retail jewelry market and replacement cost of Respondent's lost pendant represents a figure several thousand dollars less than the award granted by the trial court, i.e., $3,000 - $4,000 less.

The case of Stoll v. Almon C. Judd, 106 Conn. 551, 138 A. 479 (1927), was a situation in which the plaintiff, a jobber who purchased jewelry from manufacturers and sold to retail outlets, left his jewelry cases, for safekeeping, with an employee of defendant's hotel. The cases were then apparently stolen. The trial court awarded judgment for the plaintiff, from which the defendant appealed. The trial court had charged that the plaintiff could recover:

> ...the value in the market open to the plaintiff at the time of loss.
> 138 A. 479, 483 (emphasis added)

The defendant complained that this instruction was deficient because the jury was not instructed that the market value referred to should be the wholesale market.

The appellate court found, however, that the jury had

applied the standard forwarded by the defendant, the jury's award reflecting the wholesale value of the lost jewelry and bags. The court stated:

> Market value means, generally, the price for which an article is bought and sold, and is ordinarily best established by sales in the ordinary course of business...
> 138 A 479, 483 (emphasis added)

Sales of an item, such as the lost pendant in this case, in the ordinary course of business would be based on a figure of around $5,000.00, as testified to by Mr. Nash. Therefore, in the market open to Respondent in the ordinary course of business, a replacement would cost not more than $5,000 retail.

The case of Lipschutz v. Gordon Jewelry, 373 F. Supp. 375 (S.D. Tex. 1974) involved an action brought to recover damages resulting from the loss of diamonds sent by a dealer to a jeweler. The "stated value" of the shipment was $273,55 The defendants argued that the plaintiff had to show the actual damages suffered rather than merely relying on this stated value. The court rejected this argument, finding that the "asking price" is the accepted measure of damages in the diamond industry. Herein, the "asking price" that a Salt Lake retail jeweler would seek, as testified to by Mr. Nash, is a figure several thousand dollars less than the award granted by the trial court. This "asking price" would be the amount in "the market open to the plaintiff." Again, in Salt Lake City, the market figure for a similar pendant

open to the plaintiff would be around $5,000.00. This figure should then represent the limits of Respondent's recovery.

POINT III

THE TRIAL COURT ERRED IN RECEIVING THE APPRAISER'S TESTIMONY ON THE MARKET VALUE OF THE JEWELRY.

Counsel for Appellant objected at the trial to the fact that Mr. VanderVeer's testimony on the retail value of the jewelry was given without proper foundation being provided regarding VanderVeer's expertise in the Salt Lake City retail jewelry market (T 13). Nevertheless, the court received VanderVeer's testimony concerning the retail value of the pendant. By receiving such testimony, the court committed error. VanderVeer was not competent to testify as an expert witness regarding the retail prices of jewelry. Mr. VanderVeer dealt in the jewelry market as an occasional dealer and appraiser at the wholesale level, but he admitted he had no experience at the retail market level.

When this is considered with VanderVeer's incorrect assumption regarding the retail practice of "keystoning", or doubling of wholesale, it is clear that VanderVeer was not competent to testify as an expert on the retail value of jewelry in the Salt Lake City retail market.

The Oregon Supreme Court in State v. Arnold, 218 Ore. 43, 341 P2d 1089 (1956), a case concerning valuation of a state condemned leasehold in surface and mineral rights, stated:

> We have held that an expert cannot give an opinion unless the facts upon which his opinion is based are disclosed by his or other witness' testimony. P2d 1089, 1101

The facts upon which VanderVeer based his appraisal reflect incorrect assumptions and a lack of expertise in the area of retail sales of jewelry. Such lack of knowledge concerning the retail market renders VanderVeer's testimony unpersuasive and incompetent on the subject of value of the pendant cross.

POINT IV

THE TRIAL COURT ERRED IN AWARDING DAMAGES THAT CREATE A WINDFALL FOR THE RESPONDENT.

The preceeding pages indicate that any recovery over the retail market-replacement value is excessive, because such additional recovery would result in windfall profits to respondent. Respondent did not tender payment for the jewelry at a price greater than the retail market-replacement value; in fact, the jewelry in its original state, a bracelet, was a gift to her. In Stoll v. Almon C. Judd, Supra., the Court declined to award the plaintiff the retail value of the lost property, determining that a recovery on that figure would amount to windfall profits.

Herein if the Respondent should be permitted to recover the amount of damages assigned by the trial court, she would receive a windfall in excess of $3,000.00 The evidence clearly supports a recovery of $5,000.00 or less.

Damages have frequently been reduced where the figure set by the trial court was determined to be excessive. It is definite as a matter of law that the $8,180 figure set out by the trial court in this case is disproportionate to any reasonable limit of compensation due to the fact that: 1) the trial court utilized the wrong measure of damages, and 2) the market value-replacement cost is significantly lower than the appraisal value. It can be said that neither the evidence nor the rules of law support a damage recovery in the amount declared by the trial court. This means, as the court in Farris v. Clark, 158 Mont. 33, 487 P.2d 1307 (1971), held, inter alia, that it was error to award the plaintiff with a sum that was inconsistent with the proof of loss and that the award should have been limited to the market value of the car that was damaged in the accident, plus towage and storage.

Here the proof of loss and retail market value point to a figure of approximately $5,000 for the lost pendant. Additional recovery creates a windfall for the Respondent.

CONCLUSION

The trial court erred in applying the measure of damages and failed to recognize that the appraisal value is not the same as the market value in the Salt Lake City retail jewelry trade. The evidence and rules of law indicate that the recovery determined by the trial court is excessive.

For the foregoing reasons, the damage award of the

trial court should be remitted to the appropriate amount.

Respectfully submitted this 9th of February, 1978.

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CERTIFICATE OF DELIVERY

I hereby certify that two true and correct copies of the foregoing brief of defendant-appellant were delivered to John Preston Creer of Senior & Senior, 1100 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, this _____ day of February, 1978.

Richard C. Landerman